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No. 89-1689

In The

Supreme Court of the United States

October Term, 1989

JOHN P. O'MALLEY and JAMES A. NESBITT,

Petitioners,

vs.

FATHER PATRICK H. O'NEILL, et al.,

Respondents.

BRIEF OF RESPONDENTS ST. THOMAS UNIVERSITY, J. PEPE FANJUL, KENNETH J. WHITTAKER AND THE NON-AUGUSTINIAN TRUSTEES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER A TERMINATION OF EMPLOYMENT FOR REFUSAL TO PARTICIPATE IN A PATTERN OF RACKETEERING IS ACTIONABLE UNDER THE RICO STATUTE, AND IF SO, WHETHER A REVERSAL OF THE APPELLATE COURT'S DECISION AS TO RESPONDENTS ST. THOMAS UNIVERSITY, J. PEPE FANJUL, KENNETH J. WHITTAKER, AND THE NON-AUGUSTINIAN TRUSTEES IS REQUIRED.

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The instant brief is filed on behalf of respondents St. Thomas University, J. Pepe Fanjul, Kenneth Whittaker, and the non-Augustinian trustees, all of whom were defendants and appellees below.[1] The above-named

[1] Appellees J. Pepe Fanjul and Kenneth Whittaker are both non-Augustinian trustees of St. Thomas University, but were sued both individually and as trustees. All of the other appellees who are non-Augustinian trustees were sued only as trustees, and not individually, and are referred to herein collectively

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respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case. That decision is reported at 887 F.2d 1557, and is reprinted at pp. 11-26 of the petitioner's appendix ("App.").

STATEMENT OF THE CASE

We have no quarrel with the petitioners' general statement of the case (Pet. 3-7), except to point out that the petitioners' lengthy quotation from the appellate court's opinion (Pet. 3-4) is not a summary or ratification of any factual finding, but only a summary of "the plaintiffs' claims . . . " (App. 13). As the court of appeals put it, "[w]hile we assume these allegations to be true for the purposes of this appeal, they are hotly disputed by the defendants" (App. 14 n.4).

We should also emphasize the petitioners' omission of any reference to the independent basis for the appellate court's affirmance of the judgment entered on behalf

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as the non-Augustinian trustees. They are Doug Adams, Ken Jenning, Ken Lawrence, Nicholas H. Morley, Dr. Ricardo Pines, and Evelyn Poole. Two of the university's Augustinian trustees were also defendants and appellees below, Reverend Father John E. Deegan, OSA, and Reverend Father John E. Driscoll, OSA, and are represented by other counsel in this proceeding. Respondent Patrick H. O'Neill, the former president of St. Thomas University, who was also a defendant and appellee below, also is represented by separate counsel.

of respondents St. Thomas University, J. Pepe Fanjul, Kenneth J. Whittaker and the non-Augustinian trustees. Although the court of appeals' central inquiry was devoted to the question presented by the petitioner – whether a termination of employment for refusal to participate in a pattern of racketeering is actionable under the RICO statute – and although the court of appeals' resolution of that question required affirmance of the judgments entered on behalf of the University, Fanjul, Whittaker and the non-Augustinian trustees, the court of appeals' opinion recognizes a wholly-independent basis for affirmance.

As the opinion notes (App. 15), although Count I of the complaint charged respondent Father O'Neill with a substantive violation of 18 U.S.C. § 1962(c) (RICO), it charged the University, O'Neill, Fanjul and the non-Augustinian trustees only in Count II, and only for a RICO conspiracy, in violation of 18 U.S.C. § 1962(d). On that count, even apart from its substantive conclusion about the conduct alleged in Count I (which of course was a predicate for the conspiracy alleged in Count II), the appellate court had no trouble affirming (App. 16):

> Count II need not detain us long. The district court dismissed Count II – the RICO conspiracy count – because the allegations of a conspiracy were merely conclusory and unsupported by any factual allegations. [Citations omitted]. We find that dismissal to be proper. The plaintiffs' complaint and RICO Case Statement allege at most that some of the defendants knew about O'Neill's activities; there are no facts alleged that would indicate that they were willing participants in a conspiracy. [Citations

> omitted]. Thus, there is no palpable conspiracy claim.

This conclusion by the court of appeals ratified the district court's independent conclusion on the conspiracy count (App. 8):

> Plaintiffs assert in Count II (RICO Conspiracy) that St. Thomas University, and trustees, Fanjul and Whittaker, conspired with Father O'Neill to commit violations of the Federal RICO Act. For any of these Defendants to be charged with RICO conspiracy, however, there must be some substantive RICO violation that they conspired to commit. In other words, the RICO conspirators must have agreed to participate in the commission of two predicate acts of mail fraud. [Citation omitted]. Plaintiffs have not alleged that these Defendants agreed to participate in the commission of mail fraud; what they do allege is that each of these Defendants "adopted the unlawful acts of the others as their own." These allegations are insufficient to show that both a conspiracy existed and that the actions at issue were taken in furtherance of that conspiracy. [Citation omitted]. The mere conclusory allegation of a conspiracy with no supporting factual averments is insufficient to state a claim for conspiracy. [Citation omitted]. Accordingly, this Count is also dismissed.

ARGUMENT

In their petition, the petitioners have made no mention of the independent basis upon which the district court dismissed the conspiracy count against the University, Fanjul, Whittaker and the non-Augustinian trustees, and no mention of the Court of Appeals' endorsement of

that independent basis for dismissal. Accordingly, no such argument is before the Court. *See Mazer v. Stein*, 347 U.S. 201, 206 n.5 (1954); *Irvine v. California*, 347 U.S. 128, 129 (1954). Therefore, even if the Court were to address the single question presented by the petitioners, and even if the Court were to disagree with the court of appeals' conclusion on that question, such disagreement would provide an insufficient basis for overturning the court of appeals' affirmance of the district court's dismissal of the action brought against the University, Fanjul, Whittaker, and the non-Augustinian trustees. For this reason, as to those respondents, the petition should be denied.

Of course, the court of appeals' primary substantive conclusion – that the petitioners lacked standing to prosecute their RICO action because they had not alleged that they had been injured by reason of a violation of § 1962 – also provided an independent basis for affirming dismissal of the conspiracy count against the University, Fanjul, Whittaker and the non-Augustinian trustees. On this point, to avoid repetition, we will rely upon the court of appeals' reasoning (App. 16-26), and upon the brief in opposition to be filed by respondent Patrick H. O'Neill.

In addition, we would note that, although the petitioners did allege generally that they had been fired for refusing to participate in the alleged RICO scheme, they offered no such allegation with the requisite particularity – a point which the court of appeals found it unnecessary to reach (App. 18). To the contrary, the petitioners described only one specific incident in which only one of them (Nesbitt) had allegedly refused to unlawfully enroll a foreign student in the University, but they failed to allege that Nesbitt was fired on the basis of that single

incident. And no incidents at all were alleged regarding petitioner O'Malley. At most, the complaint and the RICO statement suggested that the petitioners were fired because they threatened to blow the whistle – an allegation which unquestionably fails to constitute a cognizable racketeering injury.

Moreover, even if the petitioners had alleged their cause of action with the requisite specificity, the court of appeals was right to hold that such an allegation is not sufficient to confer standing under RICO. And beyond that, our primary point is that the court of appeals' opinion must be affirmed as to the University, Fanjul, Whittaker and the non-Augustinian trustees, regardless of the ultimate disposition of this point.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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